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IN THE

Supreme Court of the United States

October Term 1947.

No. 518.

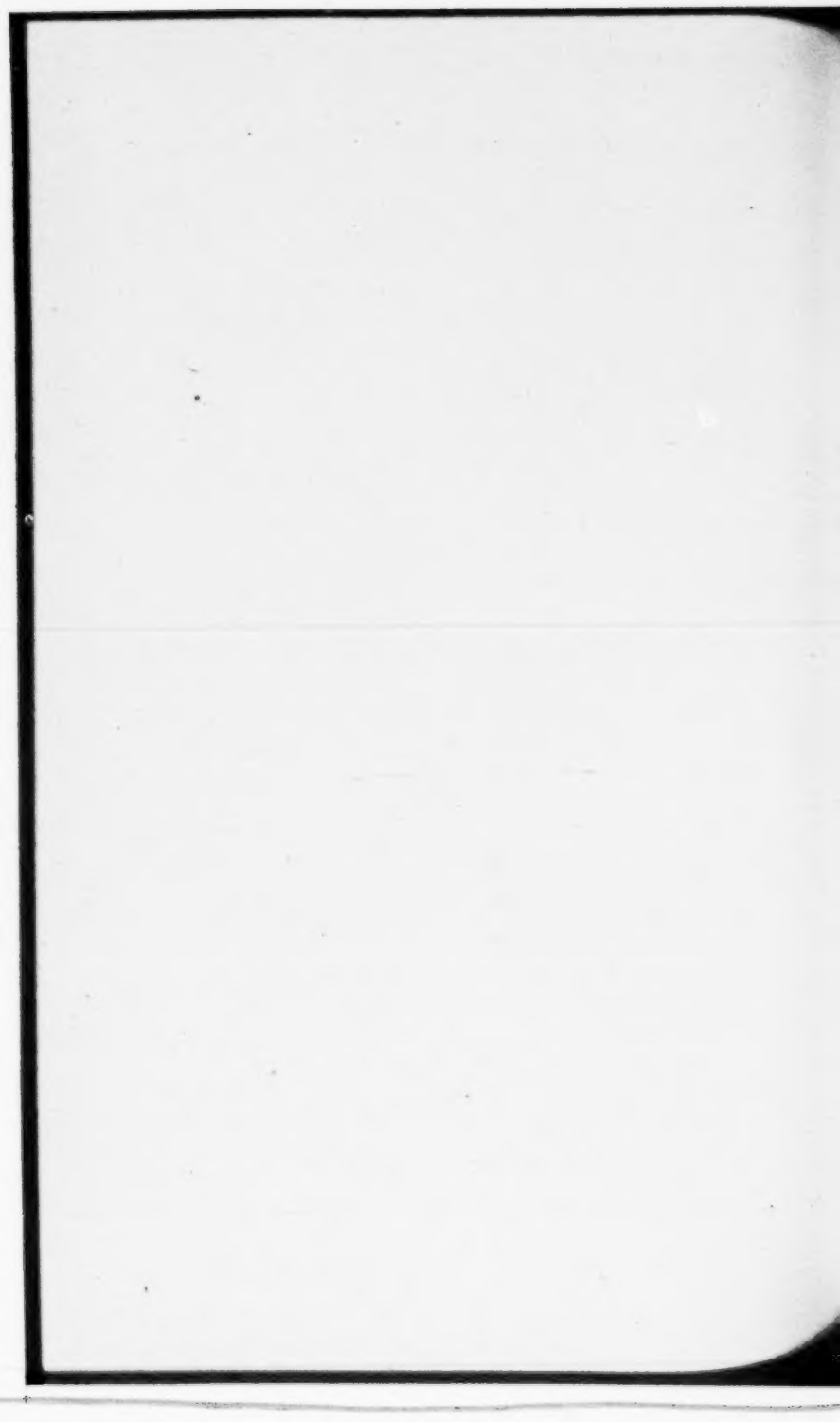
ROBERT E. DINEEN, Superintendent of Insurance of the
State of New York, as Liquidator of New York Indem-
nity Company, *Petitioner*,

v.

THE UNITED STATES.

**PETITIONER REPLY TO THE GOVERNMENT
OPPOSITION.**

✓ CAMDEN R. MCATEE,
Attorney for Petitioner.



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By this reply, petitioner, respectfully and briefly, would show lack of substance in the discussion of the Specifications of Error of the petition posed in the Opposition as its restatement of the Questions Presented.

Restatement 1. Whether the Government waived the provision for liquidated damages for delay in Section 9 of a standard form construction contract by its failure to terminate the contract because of the contractors' two-month delay in commencing work.

The Opposition states the petitioner contention that the entire non-performance of the contractor, in the first 60 contract days, required the government to terminate the contract is without support either in *United States v. American Surety Co.*, 322 U. S. 96, or in Article 9 of the contract.¹

Arguendo, The Opposition recites as the alternatives under Article 9 that government termination of the contractor right to proceed entitles the government to complete performance with aid of others, and to charge the excess cost to the contractors, or, in case the government does not terminate and the contractor proceeds, to recover liquidated damages for each day of unexcused contractor delay beyond the specified date of completion.² This general statement is then modified by admission that the *American Surety Company* opinion holds all claims for liquidated damages are foreclosed by government termination of the contractor right to proceed, and by denial that the opinion holds the government is required to terminate; it then concludes it would be a strange rule of law to impose a duty to terminate the right to proceed as inclusive of termination of the alternative right to liquidated damages where Article 9 clearly provides for an election.

The argument is not relevant as the petition urges no such strange rule of law. The first specification of error invokes whether extensive delay admittedly permitted or provoked by the government amounts to waiver or breach of the contract provision for stated timely performance. The specification propounds definite error below in decid-

¹ Article 9 appears on pp. 3, 11 of the Record, and p. 8 of the Opposition.

² The statement omits that Article 9 permits the contractor to escape all liability for liquidated damages not only in case of government termination by notice for lack of diligence or other breach by the contractor or by any breach by the government, but also where the contractor voluntarily abandons performance or provokes termination by the government. *American Surety Co.*, *supra*.

ing the right to liquidated damages continues in effect when it appears that, during 60 days in which the contractors entirely failed to proceed, the government, intending not to terminate the right to proceed, "*urged the contractors to proceed and called their attention to the contract provisions for liquidated damages,*"³ meaning that "*the government contracting officers would * * * allow the contractor to proceed to completion, despite unexcusable delays, so as not to forfeit mounting liquidated damages, thus precluding prompt completion and occupancy of needed structures.*"⁴ The specification propounds not that termination was the government alternative, but that the evident government waiver of its right to procure timely performance relieved the contractors of liability in liquidated damages when subsequent performance was accepted and compensated.⁵

With such actual situation presented, the Opposition, and also the petition, seek further construction of the phrase in Article 9: "If the government does not terminate the right of the contractor to proceed." The Opposition seeks approval of the situation existing herein, notwithstanding the *American Surety* opinion shows such situation was forecast as possible and advanced as a government argument against the construction of the phrase as a condition precedent, which construction the *American Surety* opinion nevertheless accepted and approved. Alternatively, the Opposition seeks approval of a right of the government to assert and collect liquidated damages *in terrorem* not as compensation for any loss, but as a spur to effort.⁶ As this

³ Quoted from Finding 6 (Record p. 12) (Petition p. 6). The opinion below emphasizes the situation by saying (contextual insertions added): *It (the government) would probably have been entitled to do so (to terminate the contract) because of the contractors' tardiness in performance* (Record, p. 23).

⁴ Quoted from *American Surety Company* opinion (Petition p. 11).

⁵ *Phillips, etc. v. Seymour*, 91 U. S. 646, quoted p. 8 of Petition.

⁶ Expressly denied in *Priebe & Sons v. United States*, 322 U. S. 406.

Court has rejected each assertion, the Opposition makes no substantial answer to the first specification of petitioner. It follows the disregard below of the *American Surety* decision requires grant of the petition.

Restatement 2. Whether the failure of the Government to make monthly progress payments, which resulted in a temporary suspension of work, relieved the contractors from liability for liquidated damages for other delays for which they were solely responsible.

The Opposition declares untenable the petitioner contention that government failure to make monthly progress payments and the resulting suspension of work "put the liquidated damage obligation out of the contract".⁷ As the petitioner contention is incorrectly declared, the declaration is without substance.

The opposition Statement is that after the government failure on October 1st to make the monthly payments, the contractors financed their own operations until stopped on November 1st because their own resources were exhausted and the monthly payments were not received.⁸ The Opposition contention that the return of the contractors to completion of the work after the stop order of November 1st, instead of the contractor refusal to proceed further because of the 13 day delay in November, points that the incorrect declaration, coupling failure to pay estimates and resulting suspension, is purposely presented to raise argumentative confusion. The confusion designs escape from settled precedent that the admitted government failure on October 1st to pay the estimates was the termination that "put the liquidated damage obligation out of the contract."⁹

⁷ Correct statement of the petitioner contention is "*as the breach and termination put the liquidated damage obligation out of the contract*". (Petition p. 14.)

⁸ Opposition, page 4.

⁹ See pp. 12, 13 of Petition.

It follows the government, and not the contractors, would unilaterally keep alive only selected contract provisions, and that discussion of delays is not material where breach as termination has discharged liability of the contractors in liquidated damages for delays.

The Opposition offers no substantial objection to the petition argument in support of the second specification.

The second petitioner specification is error below in *holding* the failure and refusal of the government to pay the estimates did not breach and terminate the contract in relief from liquidated damages, in *holding* the government could require the contractors to proceed upon their own resources, and so escape the effect of its default, in *holding* the stop order suspended the original contract instead of the substituted performance of the contractors, and *in the consequent conflict with precedents*.

Restatement 3. Whether the Government is required to prove actual damages from delay in completion of the contract notwithstanding the contract provision that "the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages" a specified sum for each day of delay.

The specification is the penal effect of assessment of \$100 a day as liquidated damages, and is entirely different from the restatement.

The Opposition ignores the pertinent facts that the sum of \$100 a day as damages imposed for completion of a \$91,000 contract, was collected against a \$48,000 contract, and that only \$25 a day was imposed in similar contemporaneous contracts;¹⁰ it also ignores that delays for 104 days embracing the 93 controversial days were the consequences

¹⁰ See pp. 12-13 of Petition.

of waiver and breach by the government;¹¹ it also ignores that the highway section 10 months after the completion date was entirely useless without bridges at one end or roadway at the other so that its delayed completion caused no interference or other damages.¹²

The Opposition is merely that this Court has upheld the validity of comparable liquidated damage provisions in decisions recently approved in *Priebe & Sons v. United States*, October Term 1947, No. 16, decided November 17, 1947, 322 U. S. 407.

Contrary to the Opposition contention that the provision is not significantly different, petitioner submits its examination is subject to the applicable rules quoted in the petition from the *Wise* and *Kothe* opinions,¹³ and to the further later development of said rules in the *Priebe* opinion (*supra*). The latter opinion holds "*exaction of a punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust*," after considering the limitations of the exaction (parentical words inserted for contextual purposes) as follows:

It (the exaction) might, as respondent (the government) suggests have an *in terrorem* effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair statement of damages to be suffered but to serve only as an added spur to performance. It is well settled contract law that the courts do not give their imprimatur to such arrangements.

¹¹ Inclusive of the 93 days charged to the contractors, there are 104 days of government delays which embrace 60 days of contractor failure of diligence waived by the government as covered by liquidated damages (Finding 6, R. p. 12) also 31 days in October when the contractors agreed to proceed upon their own resources and were hindered by non-payment of the due estimates, also 13 days in November when the contractors were without their own resources and unable to proceed without the estimates. (Finding 8, R. pp. 12-14.)

¹² Finding 14 (Record p. 17) (Petition p. 6).

¹³ 249 U. S. 361, 365; 280 U. S. 224.

The intention at its insertion, called for by the *Wise* opinion, and its reasonable relation to any probable damage called for by the *Kothe* and *Priebe* opinions are the measures of the provision for liquidated damages. At insertion the necessity of prescribed timely completion was evidently lacking, else entire non-performance for 60 days of the 150-day period would not have been waived;¹⁴ the necessity was again lacking 10 months after the completion date when the highway section was useless as without bridge approaches or necessary extensions at its ends.¹⁵ Hence neither valid intention nor reasonable relation underlies the instant provision.

This issue of penal effect is of course material only while liability adjudged below for liquidated damages remains as subject to imposition.

Grant of the petition for cause shown on each specification is submitted proper primarily because of evident conflicts of decision.

Respectfully submitted,

ROBERT E. DINEEN,
Superintendent.

By (s) CAMDEN R. McATEE,
Attorney for Petitioner.

¹⁴ Note 3, *supra*.

¹⁵ Note 12, *supra*.